Department of Housing & Community Development
Housing Appeals Committee
Werner Lohe, Chairman

Guidelines for Local Review of Comprehensive Permits
October 1999

Introduction

The Massachusetts Comprehensive Permit Law (Chapter 40B, §§ 20-23 of the General Laws, enacted as Chapter 774 of the Acts of 1969) encourages the construction of affordable housing using locally granted permits. The law enables a local Zoning Board of Appeals (ZBA), in consultation with other local boards and officials, to grant a single permit to an eligible developer proposing state or federally sponsored low or moderate income housing. It also permits the Board to override local requirements and regulations that are inconsistent with affordable housing needs if environmental and planning concerns have been addressed. For instance, the ZBA may permit construction of housing at a density greater than that allowed by local zoning. State requirements may not be overridden.

A developer who is denied a comprehensive permit may appeal the decision of the Zoning Board of Appeals to the state Housing Appeals Committee if less than 10 percent of the community's housing stock is subsidized housing. The developer may also appeal to the Committee if the permit is granted, but with conditions that may render the proposal economically unfeasible.

The Committee encourages settlement through the Affordable Housing Mediation Program of the Massachusetts Office of Dispute Resolution. But if no agreement can be reached, the Committee conducts a new hearing to consider the impact of the proposed housing on local concerns—environmental, health, safety, design, open space, planning, and other concerns.

The Housing Appeals Committee regulations (760 CMR 30 and 31) govern procedures under the Comprehensive Permit Law. Although a number of provisions in the regulations affect local ZBAs, for the most part they do not address local hearings directly. The Committee has also issued Model Local Rules, but they provide only minimum standards for local hearings. These guidelines, therefore, though they do not have the force of law, are intended to supplement the formal regulations and model rules, suggesting procedures for local hearings and discussing common issues that may arise. Although the comprehensive permit process is similar to other local proceedings in some respects, it is more complicated and requires particularly careful attention from local officials. The purpose of the law is to provide a flexible process, which contrasts markedly with the rigid framework of traditional zoning. If used creatively, the comprehensive permit law can be a powerful mechanism which permits a community to shape housing development to meet its needs. These guidelines attempt to assist

municipalities in doing that.

Before an Application is Received

Guideline 1: Municipal officials should address affordable housing needs and prepare for the submission of a comprehensive permit application before one is received.

Every community in Massachusetts has unmet housing needs. Towns that are prepared are in the best position to respond positively to comprehensive permit applications. Among the steps that can be taken are: establishing a local housing partnership or other local body to address affordable housing issues; preparing a housing needs study; preparing, updating, and implementing a comprehensive plan that addresses affordable housing needs; and undertaking local affordable housing development initiatives.

When possible, a municipality should try to anticipate the filing of a particular comprehensive permit application. The formal process is quite complex, and therefore before the permit application is filed, it is useful for the developer, town officials, and residents to have a common understanding of the process. Informal discussion of the proposal itself may also be valuable.

The comprehensive permit process, like more traditional development permitting processes, can be viewed as a negotiation. But it is even more complex. For any development, a local board must investigate the facts. Under zoning and subdivision procedures, however, the ZBA or planning board then applies existing bylaws and regulations to the facts in a relatively straightforward way. But in considering a comprehensive permit, the Board of Appeals must not only determine the facts, but also consult with other town boards and officials and then decide whether to waive or modify local restrictions. This complicated task can best be undertaken by the Board with the assistance of others.

Ideally, the roles of different boards and individuals in town government should be clarified before the application is filed. At a minimum, this should be done immediately afterward. In particular, the negotiation process is not easily conducted only in the public forum of a Board hearing. While respecting the requirements of the Open Meeting Law, it can be of great benefit to the town to designate a town staff person (or a member of a local housing partnership of even a member of another town board) as the town's principal informal contact, facilitator, or negotiator. This person might be the planning director, the town administrator, or even town counsel.

If the Board is not familiar with the Comprehensive Permit Law, it should consult with town counsel or special counsel at its earliest opportunity. In many cases, a lawyer can be helpful not only by educating and advising the Board, but also by anticipating procedural misunderstandings so that the environment remains courteous and constructive. And, conversely, if the process turns more adversarial than collaborative, counsel is essential to protect the town's interests.

Review of the Application

Project Eligibility - Site Approval

Guideline 2: The Zoning Board of Appeals should not open the hearing until a site approval/project eligibility letter has been received.

A comprehensive permit application should include a project eligibility letter (sometimes called a site approval letter). This letter, normally issued by a state or federal housing agency to the developer, indicates that a described project on a specific site is eligible under a particular housing subsidy program. Project eligibility does not necessarily mean that the project has received final funding approval. Rather, it indicates that the project has received preliminary approval and is likely to be approved. This protects the community by ensuring that the ZBA will not spend time reviewing a proposal that is unlikely to be realized.

The Massachusetts Department of Housing and Community Development (DHCD) and the Massachusetts Housing Finance Agency (MassHousing) currently issue project eligibility letters for most of the Commonwealth's housing subsidy programs. When a private or non-profit developer submits an application under one of the Commonwealth's housing programs, DHCD or MassHousing staff review the proposal to determine general consistency with program guidelines. They also conduct their own evaluation of the site, including an on-site visit. At the same time, they solicit written comments from the chief elected official of the community in which the housing is proposed. That official may request input from a local housing partnership (if there is one) or other local boards or officials. No formal public hearing is required.

At the end of the comment period, the subsidizing agency prepares an evaluation report, and the local comments are compiled. Based on this information, a letter is issued by DHCD or MassHousing approving, conditionally approving, or rejecting the application. Either an approval or conditional approval letter may form the basis for an application to the ZBA for a comprehensive permit.

Though the number of federal housing subsidy programs for construction of new housing is limited, site approval letters may also be issued by the U.S. Department of Housing and Urban Development (HUD), the U.S. Department of Agriculture Rural Housing Service, and the Federal Home Loan Bank of Boston through its member banks. In addition, DHCD issues project eligibility letters for state programs for public housing.

Many project eligibility letters expire two years after the date of issue, though the developer may request that the housing agency extend the letter. Because the project eligibility letter must specify a particular housing program, if the developer changes housing subsidy programs, a new or updated project eligibility letter is required.

Application Requirements

Guideline 3: The Zoning Board of Appeals should review an application immediately to determine whether it adequately describes the proposed housing.

Contents of the Application

The following should generally be submitted to the ZBA with a comprehensive permit application:

Project Eligibility Letter - A project eligibility/site approval letter from a state or federal housing agency that states that the project has been determined eligible under a particular housing subsidy program;
Evidence of Site Control - Evidence that the developer has control of the property in question: a copy of the deed, purchase and sale agreement, option agreement, or similar documentation;
Preliminary Site Development Plans - Plans showing location and footprints of buildings, as well as roadways, paved areas, open space, and drainage;
Site Conditions Report - A narrative description of site and existing buildings;
Preliminary Drawings - Preliminary architectural drawings, including typical plans and elevations for each building type;
Building Tabulation - A tabulation of the proposed number of buildings, units, and bedrooms per building;
Subdivision Plan - A plan showing the subdivision, if a subdivision is part of the proposal; size and frontages of lots and streets may vary from local requirements, but the drafting of the plan should conform to the technical standards of the municipality, though it need not contain the detail of a definitive subdivision plan;
Utilities Plan - Plans indicating the approximate location of utilities and other infrastructure;
Requested Exemptions - A list of requested exceptions to local bylaws, codes, ordinances, regulations, and fees, including the zoning bylaws and subdivision regulations.

The ZBA has a right to receive complete information from the applicant, and the applicant should normally provide all of the listed material. If significant information is missing from the application, the Board may deny a comprehensive permit or it may open the hearing on the condition that application be completed before the hearing is closed. Both the ZBA and the developer should bear in mind, however, that it is more important to focus not on technicalities, but rather on gathering information related to design issues that are particularly difficult or controversial.

It is common for the ZBA to need additional information after the application is filed or during the course of the local hearing. It is entitled to ask for whatever information is reasonably needed to make a sound decision, bearing in mind that the developer need only submit preliminary plans, not final construction drawings.

A comprehensive permit should be denied for lack of information only if the Board has made a clear written record well in advance of issuing its decision as to exactly what

necessary information the applicant failed to provide.

Jurisdictional Requirements

To submit an application for a comprehensive permit, the applicant or project must meet three jurisdictional requirements:

1) The developer must be a public agency (often a local housing authority), a non-profit organization, or a limited dividend organization. Typically, a "limited dividend organization" is any organization (a corporation, a partnership, a limited partnership, or even an individual developer) that is willing to enter into a written regulatory agreement with a state or federal housing agency agreeing to limit its profit on the proposed development to a level prescribed by that agency.

2) The project must be fundable under a state or federal low or moderate income housing program. A project eligibility letter normally constitutes evidence of fundability. If a developer is considering more than one subsidy program for the project, the application must list each option being considered and must include a project eligibility letter for each. It must also describe all design or project differences under the options.

3) The developer must control the site. A deed showing outright ownership, a purchase and sale agreement, an option agreement, or similar documentation typically satisfies this requirement.

Content of Plans and Narratives

Generally, plans and narratives submitted to the ZBA should relate to three areas: existing site conditions, site development, and development impacts and benefits. The actual items necessary will depend on the specifics of the site and the proposal, but the following should be expected:

1) Existing Site and Site Area
Plan(s) - topography and vegetation, open spaces, property lines, existing buildings and structures, existing on-site utilities and infrastructure, existing public and private streets, wetlands and other resource areas and buffers.
Narrative - abutters list; alternative site uses under existing zoning; first level environmental assessment under Massachusetts General Laws Chapter 21E (if available); identification of any features of historic or archeological significance; identification of any significant natural resource or wildlife habitat. Environmental, historic, and similar narratives need not be more detailed than required by the agencies having primary responsibility in these areas, and it is frequently appropriate that they be less detailed.

2) Proposed Site Development
Plan(s) - all proposed structures including building footprints, roadways, driveways, parking, and drainage structures; typical drawings for each housing type; utilities and other infrastructure; changes in grading/topography, landscaping, and open space;

subdivision of land (if applicable).
Narrative - housing program (e.g., Local Initiative Program); housing types and bedroom mix data; proposed affordable/market rate ratios; project density; ground coverage data; proposed landscaping/buffers; G.L. Chapter 21E remedial action (if applicable).

3) Project Impacts
Impacts - on traffic (on-site circulation, entrances and exits, trip generation data, sight and stopping distance, existing and proposed levels of service); on historical, archeological, open space, wildlife habitat, or recreational resource(s); on municipal services (public safety, water supply, sewage treatment); construction impacts (noise, dust, erosion/siltation, potential releases).

Requesting Additional Information

Guideline 4: The Zoning Board of Appeals may request information needed to make a decision, but may not require information that is too broad in scope, irrelevant to the specific project, or not required of similar developments.

What the Zoning Board of Appeals Can and Cannot Request

If necessary, the Zoning Board of Appeals may require information beyond what is contained in the application. It may also require analysis of the impact of the proposed development upon natural resources and the built environment both on- and off-site. Examples include requesting information relating to the impact of the proposed development on water supply or wetlands, on infrastructure such as roads and drainage systems, or on municipal facilities, such as water and sewer facilities. The ZBA may request information that relates to the health and safety of both the residents of the dwellings being constructed and the community in general. In some cases, the Board may inquire into additional benefits that the project might provide (in addition to the provision of affordable housing), such as new amenities, infrastructure, or traffic improvements.

In deciding what information to request, the ZBA should use common sense to weigh the burden imposed by the request against the relevance and usefulness of the information. In drawing the line between information necessary to give a full picture of the proposal and information that places an undue burden on the applicant, the Board may request advice and assistance from a local housing partnership or other local and regional boards or agencies. It should also consider the consistency of the request with past requests for projects of similar size.

Some requests for additional information, however, are improper. Examples include:

1) Final Plans - The ZBA may not require final plans before granting the comprehensive permit. Examples include complete engineering plans, final construction plans, and final architectural drawings. (Before construction begins, final plans should be submitted, with the comprehensive permit, to the building inspector for review prior to issuance of building permits.)

2) Irrelevant Information - The Board may not require information that is unimportant or irrelevant to the issues under consideration.

3) Excessively Broad Information - The Board may not require information that, while relevant to the application, is so broad that the applicant must address more than its share of an issue that affects the community at large. For instance, it should not require an applicant to prepare a town-wide hydrogeologic study for a series of municipal supply wells, in lieu of a project-specific study, simply because the development lies within a zone of contribution to a well. It should not require a citywide sewer needs study simply because the applicant proposes to connect to a city sewer system which is already close to capacity. It should not require the applicant to map all wetlands within a wide radius of the site.

4) Unduly Burdensome Information - The Board may not require information from the developer of affordable housing that it would not require or has not required from developers seeking a special permits or variances for market-rate development of similar density, design, and location.

5) Financial information - Review of a developer's financial information and projections is primarily the responsibility of the subsidizing agency. Therefore, normally the Board may require an applicant to provide only a limited amount of financial information concerning the project. If the Board has serious concerns about the financial soundness of a proposal or suspects that profits may be excessive, it should consult with the subsidizing agency. Only if it is apparent that these matters are not being addressed by that agency should the Board conduct an independent inquiry.

When the Applicant Will Not Provide Information

While most applicants for comprehensive permits will attempt to comply with requests for additional information, some will decline to do so. If information is not forthcoming in response to an oral request during the hearing, the Board should put the request and the reasons for it in writing well in advance of issuing its decision. If the applicant does not provide the requested information, the Board may either make a decision based on the information available at the close of the hearing or it may deny the application for failure to provide sufficient information.

Non-Traditional Subsidy Programs

Housing programs that have become popular in the 1990s, in particular the Massachusetts Department of Housing and Community Development Local Initiative Program (LIP) and the Federal Home Loan Bank of Boston Affordable Housing Program (AHP) and New England Fund (NEF), differ in some respects from the traditional programs under which affordable housing has been built using comprehensive permits. It is important that municipalities understand the differences.

The role of the chief elected official (CEO) (usually the mayor of a city or the board of selectmen of a town) is greatly enhanced under LIP. For a proposal to receive a project eligibility letter from state officials, an application must be submitted to the state not by the developer, but rather by the CEO of the municipality. Thus, if the developer and the town cannot agree on a mutually acceptable proposal, the proposal cannot become a LIP project eligible for a comprehensive permit. (Under these circumstances, however, the developer may proceed with the project if it receives preliminary approval and a Project Eligibility letter under a different housing subsidy program.) For LIP projects, state officials typically defer to the judgment of local officials more readily than in traditional programs, and thus it is essential that the CEO be involved in all of the details concerning both design and programmatic aspects of the proposal. State officials and the CEO are also jointly responsible for reviewing financial aspects of the proposal and for long-term monitoring. The ZBA should confirm that the CEO in particular is fully cognizant of its responsibilities in these areas. If it appears during the hearing that these issues have not been addressed, the ZBA should consult with the CEO before proceeding, or even, in exceptional circumstances, investigate these issues itself.

In AHP and NEF projects, the CEO has no formal role, but the ZBA itself has increased authority over design, programmatic issues, finances, and monitoring. The ZBA's involvement requires more time, energy, and resources in order to properly address these issues, but it also significantly enhances local control over all aspects of the development. When the ZBA receives an AHF or NEF application, it should familiarize itself with the Housing Appeals Committee's decision in Stuborn Ltd. Partnership v. Barnstable, No. 98-01 (Mass. Housing Appeals Committee Mar. 5, 1999), which sets out new roles for the Board with respect to these projects.

Notice to Other Boards and Officials

Guideline 5: The Zoning Board of Appeals should send copies of the comprehensive permit application to all relevant local boards and solicit their advice both before and during the hearing process.

Notice

The public hearing procedures followed for comprehensive permit applications are the same as other public hearings held by the ZBA in most respects. A significant difference is that when a comprehensive permit application is filed, the Board must notify any other relevant municipal boards and officials and forward a copy to them. Such boards include the planning board, board of selectmen or city council, conservation commission, board of health, department of public works, fire chief, and police chief. When a project will be located on a town boundary, or will have a significant effect on another town, the adjoining town should be notified as well.

Section 21 of Chapter 40B states that "The board of appeals shall request the appearance at such hearing of such representatives of said local boards... and, in making its decision on said application, shall take into consideration the recommendations of the local

boards...." This requirement is sometimes overlooked. Boards may mistakenly believe they have little or no role to play in the comprehensive permit process. But on the contrary, input from local boards and professional staff is critical to sound, well documented permit decisions. Though some boards may choose to put their comments in writing, it is frequently more beneficial to use the process described in the statute, that is, to have a representative of each board attend the ZBA hearing, not as a voting member, but as an advisor.

Boards with State Law Jurisdiction

The Conservation Commission and the Board of Health have separate jurisdictions, which are not subsumed within the comprehensive permit process. They should conduct separate hearings relating to state requirements in their areas (i.e., the Wetlands Protection Act and state "Title 5" septic regulations). However, local bylaws or regulations enforced by these boards that are more restrictive than state requirements may be waived by the ZBA if requested by the applicant and if waiver is consistent with local needs (see § IV, below).

Guideline 6: The Zoning Board of Appeals should confer with counsel on any application for a comprehensive permit, and, in particular, should seek advice on procedural questions and on the drafting of its decision.

The advice of counsel early in the application process can be invaluable. Similarly, it is usually helpful to have town counsel draft or at least review the Board's written decision. If town counsel is unfamiliar with the comprehensive permit process, he or she is encouraged to contact the Housing Appeals Committee for information concerning comprehensive permit procedures. In some instances, the Board may wish to use outside counsel with particular expertise in the comprehensive permit process.

The Hearing Process

Guideline 7: Once a comprehensive permit application is received, the Zoning Board of Appeals must advertise and schedule hearings according to strict time requirements.

Deadlines

Upon Receipt of Application - ZBA notifies other boards & forwards copies of application
At least 14 Days before Hearing - ZBA gives public notice of hearing
Within 30 Days of Application - ZBA opens public hearing
Hearing length varies depending on need
Within 40 Days of Close of Hearing - ZBA issues written decision
(unless extended by mutual agreement)

Advertisement

As with public hearings conducted by the Zoning Board of Appeals under the Zoning Act, the Board should advertise the comprehensive permit hearing in a local newspaper of general circulation beginning at least 14 days prior to the date of the hearing, notify interested parties, and post a copy of the hearing notice in the city or town hall.

Opening the Hearing

The Zoning Board of Appeals is required to open the public hearing within thirty days of the filing of the application. Care must be taken to open the hearing on time since if the Board fails to convene the hearing within the time limit, a permit may be issued automatically.

If the application is not complete, the ZBA should either (1) open the hearing, note the missing information on the record, and request the applicant to complete the application or (2) open the hearing and deny the application without prejudice. In the first instance, the Board may choose either to begin review of the project pending further submissions or it may continue (suspend) the hearing until the necessary information is received. In the second case, not only will a new application have to be filed, but the Board will also have to issue notice and open a new hearing at a later date.

Closing the Hearing and the Written Decision

When the Board has received all necessary information and public testimony, it should close the hearing. Within 40 days of termination of the hearing, the Board must render a decision by majority vote; failure to do so may result in automatic issuance of a permit or in an appeal to the Housing Appeals Committee. A written decision should be issued and delivered by certified mail or by hand to the applicant. (A copy of the decision should be filed with the town clerk, and many Boards also record it at the registry of deeds.)

There is no specific form that the written decision must follow. Normally, however, the decision should refer specifically to the architect's or engineer's drawings or plans upon which it is based. (The decision may include a list of all waivers of local requirements being granted, though this may be unnecessary if the plans are sufficiently detailed.) In preparing the decision, the Board may request the participating lawyers to provide draft language.

It is generally unwise for the Board, even with the agreement of the developer to leave any issues for later resolution. On the other hand, it can be helpful to provide procedures for resolving disputes that may arise during construction of the development. Similarly, since it is not unlikely that the owners may desire to make physical or other changes years after construction is completed, a specification of who will review such changes (typically the Board) and what procedures will be followed is advisable.

It is useful to state clearly in the decision that final, detailed construction plans must be submitted, with the comprehensive permit, to the building inspector or other appropriate local authority before construction begins. Similarly, a regulatory agreement between the

developer and the subsidizing agency must normally be signed prior to construction.

Conduct of the Hearing

Guideline 8: At the first hearing, the Zoning Board of Appeals should ask the applicant to make a complete presentation; it should publicly identify any major issues raised by the project; and it should request submission of any necessary additional information.

The Comprehensive Permit Law statute does not describe a specific procedure for conducting the hearing. Most Boards require a complete presentation by the applicant, followed by an opportunity for Board members, other local officials, and the public to ask questions. During this process the issues of greatest concern and any need for additional information can be identified.

The presentation of the proposal is usually made by the applicant and the project's engineer or other technical experts. It is common for a lawyer representing the applicant to make introductory remarks or participate throughout the presentation.

Though some comprehensive permit hearings may be completed in one evening, several sessions are frequently required. Typically, in response to concerns raised during the hearing, modifications in the plans will be proposed. The time between hearing sessions can be used not only to permit the applicant to secure additional information required by the Board, but also for informal discussions between the applicant and municipal employees or others in the community.

Guideline 9: The hearing may be continued for a reasonable period of time with the consent of the applicant or if additional time is needed to address substantive questions.

Once officially opened, the public hearing may be continued (suspended) by the ZBA for a reasonable period of time if the application's complexity necessitates further study, if the Zoning Board requires additional information, or if circumstances have changed.

Time is often a critical element in the development of affordable housing. Communities are in a better negotiating position if the Board moves forward quickly with the hearing process. If the process becomes extended, the developer's carrying costs increase, and the room for negotiation shrinks. Though the Board should not close a hearing before it receives all information necessary to make a sound decision, repeated continuances rarely benefit the community. If the applicant believes that the hearing has been extended so long and unnecessarily that the delay constitutes a constructive denial of the permit, it may appeal to the Housing Appeals Committee.

It is common for applicants to modify their proposals due to changes in circumstances. This may be in response to changing market conditions, subsidy availability, or other factors. These changes may vary widely, involving matters such as reductions or increases in the development's density, reconfiguration of the housing units, or alteration in the target population to be served. If the changes are minor, they can usually be

incorporated into the application during the hearing. But if they are so significant that comments received by the ZBA from other local boards and officials are no longer relevant, it may be necessary to extend the hearing. In such cases, it may be useful for the Board and applicant to agree in writing to the terms of the extension.

Negotiation / Mediation

Guideline 10: The Zoning Board of Appeals is encouraged to use the local housing partnership or another local official as a negotiator with the developer during the hearing and decision process.

If there is an active local housing partnership or similar public group involved with affordable housing, that group should meet with the applicant before a comprehensive permit application is filed with the Zoning Board of Appeals. Informal review and negotiation by such a group or other local officials is beneficial to both the community and the applicant. It usually leads to a smoother and more productive process when the application is formally submitted to the Board for further review and negotiation. In some cases, an independent mediator may help the parties reach a satisfactory resolution of particularly difficult issues.

Negotiations between the developer and a municipality need not end when the hearing process begins. Negotiation may also continue after the close of the hearing, before a final decision is drafted or voted upon. But since simultaneously negotiating and deciding a case in a public forum is difficult, the discussions are frequently conducted by a town employee, by the local housing partnership, or even by a member of another board. If the ZBA is involved in the negotiations, care must be taken to comply with the Open Meeting Law; the negotiations should be based on information presented during the hearing; and progress reports should be made regularly at public meetings of the Board.

Fees

Review Fees

Guideline 11: The Zoning Board of Appeals should ensure that it has the expertise to review the proposal submitted to it, and may, under some circumstances request or require the developer to pay reasonable costs of consultants. If the ZBA determines that it requires technical advice in order to properly review an application, it may request the assistance of town staff. If permitted by its rules, and if assistance is not readily available from municipal employees, it may also employ outside consultants. Whenever possible, it should attempt to work cooperatively with the applicant to identify mutually satisfactory consultants. It may request or require that the developer pay part or all of the consultant's fee. Detailed recommendations and procedures for doing so are contained in the Committee's Model Local Rules. Even if its rules do not provide for consultants, the Board may request that the developer pay for such consultants voluntarily.

Municipal Fees

Guideline 12: Municipal fees should be reduced, if possible, to encourage the development of affordable housing.

Any filing or review fees imposed by the ZBA for the comprehensive permit application, must be part of the duly adopted municipal fee structure. They must be reasonably related to costs incurred by the municipality in reviewing the application, and they may not be higher than fees ordinarily charged for comparable permits (e.g., subdivision approval). Boards are encouraged to keep these fees as low as possible to encourage the development of affordable housing.

ZBAs are also encouraged to waive or reduce other municipal fees that would routinely be applied to the proposed housing (e.g., water and sewer connection fees). In no event may such fees be higher than those that would be assessed to a similar market-rate development.

ZBA Decision

Criteria for Decisions

Guideline 13: In reviewing an application, the Zoning Board of Appeals should work to eliminate obstacles to issuance of a comprehensive permit, devising conditions to address local concerns.

In nearly every community in Massachusetts there is a need for affordable housing. Because of the high cost of land and construction, local zoning and other restrictions frequently create barriers (usually unintended) to the development of such housing. The Comprehensive Permit Law expresses a strong public policy in favor of waiving local restrictions, when appropriate, to facilitate the construction or substantial rehabilitation of low and moderate income subsidized housing.
The statute requires that a comprehensive permit be granted when it is "consistent with local needs," and describes a balancing test. That is, on some sites it may be possible to build affordable housing that does not comply with certain local restrictions, but nevertheless has no negative impact on local health, safety, environmental, design, open space, and planning concerns. (Planning concerns include the proposal's consistency with a bona fide comprehensive plan that adequately addresses affordable housing issues.) For other sites, the impact on these local concerns may be limited enough so that these concerns are outweighed by the need for low and moderate income housing. In either case, the law requires the Board to waive the local restrictions.

The most practical approach for implementing this public policy in a way that safeguards the interests of the community and its residents is for the Board to approach the comprehensive permit application in a positive manner, assuming that it will be possible to waive certain local restrictions while addressing legitimate local concerns by placing conditions on the permit. It should review the application issue by issue, and at each juncture attempt to formulate solutions that will permit the project to proceed.

Only if, at the conclusion of the hearing, there are one or more intractable issues for which the Board has been unable to craft workable conditions that mitigate the impact of the development, should the Board deny the permit. If the Board has carefully evaluated the evidence, listened thoughtfully to all perspectives, fully investigated all reasonable solutions, and written a well reasoned decision, it will be in a strong position to defend its conditions or even a denial of the permit to the public and on appeal.

Guideline 14: The Zoning Board of Appeals should assume that its decision is final.

The best interests of the municipality and the applicant are served when the Board issues a decision agreeable to both. If a denial of a permit is appealed, in most cases the final decision of the Housing Appeals Committee or a court will clearly favor one party or the other. Thus, a comprehensive permit resulting from reasonable compromise at the local level usually means increased local control, decreased costs (fewer delays, legal costs, and consulting fees), and better housing. The vast majority of successful affordable housing produced through the comprehensive permit process is developed with locally granted permits.

Delays resulting from appeal can create additional problems. Though a comprehensive permit is issued to a specific applicant, it is transferable. When there are extensive delays, it is not uncommon for financial problems to force the original developer to restructure business aspects of the project. While it may or may not be to the town's advantage to have a new developer take over the project, the uncertainty such changes cause is rarely beneficial.

Whenever a Board issues a permit, it should assume that the development will actually be built under its permit, and should therefore ensure that all important aspects essential to a successful development are addressed.

Conditions

Guideline 15: The Zoning Board of Appeals should impose conditions on the comprehensive permit to mitigate adverse impacts and improve the development.

In considering conditions that might be imposed on a project, the Zoning Board of Appeals should focus on the health, safety, environmental, design, open space, and planning impacts of the development. The Board may impose conditions either to eliminate or to mitigate the adverse impact of the development. For example, the Board might require that the applicant relocate an entrance onto a public road that does not have adequate sight distances. It might require annual maintenance of a storm water drainage system. Or, if a septic system leaching field must be placed in a particularly sensitive area, it might require installation of monitoring wells.

In addition, the town may impose conditions that relate to the operation of the project or to the housing benefit that the community receives. The community might require

additional units be set aside as affordable units, a longer "lock-in" period, or public access to open space. Any such condition, must, however, be permissible within the constraints of the relevant subsidy program. And conditions must not be imposed in a manner that places additional burdens on an affordable housing development that would not be imposed in similar circumstances upon market-rate housing.

Guideline 16: The Zoning Board of Appeals may not attach conditions to the permit that require further project approvals by local boards, except for technical reviews prior to construction.

A condition may not be imposed that requires the applicant to return to the Zoning Board of Appeals or to any other local board for subsequent reviews and approvals. All relevant local boards and officials should be notified when the comprehensive permit application is received, and their recommendations should be considered before a decision is issued. Though the comprehensive permit is a master permit that subsumes all local permits and approvals normally issued by local boards and officials, routine technical reviews shortly before or during construction are still necessary. That is, the comprehensive permit is based upon preliminary plans. Therefore, prior to construction the applicant must submit detailed construction drawings to the building inspector to ensure that the final plans are consistent with the comprehensive permit, with local requirements not waived in the permit, and with state and federal codes. A copy of the final, approved plans should also be filed with the Board for record keeping purposes.

Since the comprehensive permit does not exempt the applicant from obtaining approvals required under state laws such as the Wetlands Protection Act, state "Title 5" septic regulations, and the state Building Code (even if such laws are administered by local boards), the developer must secure all such approvals prior to construction.

Finally, the ZBA may not impose conditions that are inconsistent with the guidelines of the subsidizing agency. For example, it may not require that a project include less than the minimum percentage of affordable units required by the subsidy program. Similarly, it may not restrict profit in a manner inconsistent with the guidelines of the housing program.

AFTER THE ZBA DECISION

Appeal to the Housing Appeals Committee

The denial of a comprehensive permit or the granting of a permit with conditions may be appealed to the state Housing Appeals Committee. A developer wishing to appeal the Board’s decision must file an appeal with the Housing Appeals Committee within 20 days after the date of receipt of the Board’s written decision. Abutters or other people aggrieved by the issuance of a comprehensive permit may appeal to the Superior Court within the same twenty-day period. (If both the developer and abutters file appeals, the Superior Court will generally not take any action pending completion of the proceedings before the Housing Appeals Committee. Abutters are always permitted to participate in

Committee hearings, and under some circumstances are formally recognized as parties.)

If the community has low or moderate income housing in excess of 10% of the housing units reported in the latest decennial census, the appeal will be dismissed. (The appeal will also be dismissed if subsidized housing comprises 1½% or more of the land in the municipality zoned for residential, commercial, or industrial use, though this geographic goal is nearly always harder to achieve than the 10% goal.) Each municipality's progress toward the 10% threshold is calculated by the Department of Housing and Community Development, and is published periodically as the "DHCD Chapter 40B Subsidized Housing Inventory."

The two key issues in defining which units count as low or moderate income housing are: (1) whether the unit was developed under a state or federal housing subsidy program; and, (2) whether there are legal restrictions that ensure long-term affordability, typically either a regulatory agreement or an affordable housing restriction. For rental projects, all units normally count as subsidized units. In homeownership programs, only the deed-restricted, affordable units count. Rental certificates or housing vouchers do not count as subsidized units since the certificate or voucher is not permanently located in a particular municipality and because there is no guarantee of long term affordability. (For more information concerning eligibility of projects and count of units see the notes accompanying the Subsidized Housing Inventory.)

Housing Appeals Committee Hearing

The Housing Appeals Committee conducts a completely new and independent hearing regarding the proposed housing. The hearing begins with a conference of counsel held in Boston within 20 days of filing of the appeal. The first evidentiary session is scheduled some time later in the town in which the housing is proposed. This permits the Committee or its presiding officer to conduct a site visit at the end of the hearing session. Any remaining hearing sessions are usually held in Boston.

Hearings before the Housing Appeals Committee, are considerably more formal than local hearings. Although they are conducted under relaxed rules of evidence, the parties are represented by counsel and there is formal examination and cross-examination of witnesses. The entire process, culminating with a written decision, typically takes three months to a year to complete.

The Committee strongly encourages settlement between the developer and the community. The Massachusetts Office of Dispute Resolution maintains a special Affordable Housing Mediation Program to assist in resolving comprehensive permit disputes on appeal to the Committee. The mediation process is voluntary and confidential.

Settlement usually benefits both parties. Expenses are less for both, the developer saves time, and the town achieves greater control over the design of the housing. If negotiations—with or without the assistance of mediation—result in settlement, the

parties typically file a stipulation of settlement with the Committee. After review, the Committee issues a simple decision approving the settlement, and remains available to the parties in case any disagreement concerning the terms of the settlement arise.

Burden of Proof on Appeal

When the Board has denied an application, it has the burden of proving on appeal to the Committee that there is a valid health, safety, environmental, design, open space, planning, or other local concern that supports the denial. That is, it must prove—normally through the testimony of expert witnesses—that the proposed project will have a serious adverse effect on the health or safety of the occupants of the project or town residents, that the design of the site or the housing is seriously deficient, or that the development would substantially impair legitimate local concerns in some other way.
In exceptional circumstances, the town may argue that the permit was properly denied due to the inadequacy of municipal infrastructure. In these cases, the Board must prove that unusual topographical, environmental, or other physical circumstances make installation of necessary municipal services technically or financially infeasible.

If the Board approves a project with conditions, the initial burden is on the developer to prove that as a result of the conditions, it is not economically feasible to build or operate the proposed housing. (Alternately, the applicant may prove that local requirements have been applied unequally to the proposal as compared to market-rate development.) Only if applicant proves that the conditions make the project uneconomical does the burden shift to the Board to show that the conditions are consistent with local needs. Thus, the Board is generally in a stronger position when it has approved a comprehensive permit application with conditions that reduce or eliminate adverse impacts than it is when it has denied a project outright.

Substantial Change

After a comprehensive permit has been issued by the Zoning Board of Appeals or the Committee, it is the developer's responsibility to inform the Board if there are any changes in the project, including a change in the funding program. The Board must then decide, within twenty days, whether the change is substantial or not. Typically, changes of a sort that would not have affected the Board's decision are considered insubstantial. For instance, a reduction in the number of housing units proposed is normally an insubstantial change. On the other hand, an increase in the number of housing units proposed or a change from single-family houses to townhouses is a substantial change.

The Board may determine that a change is insubstantial without holding a hearing. Based on such a determination (or if the Board fails to respond to the applicant within 20 days), the permit is deemed modified to incorporate the change. If the Board determines that the change is substantial, it must hold a hearing within 30 days to decide whether to permit the change. At such a hearing only the changes themselves or aspects of the proposal affected by the changes are at issue; the Board may not reconsider unchanged aspects of the project. If the applicant is dissatisfied with the Board's decision, it may appeal to the

Housing Appeals Committee. No question concerning a change in the proposal may be brought to the Committee until the Board has reviewed it.

Conclusion

Both the use of the Comprehensive Permit Law and attitudes toward it have changed greatly in the thirty years since it was enacted. In the past, it was sometimes viewed as a threat to municipal autonomy. But in nearly every community, awareness of the need for affordable housing has grown. There are many people who, acting individually and collectively, set the tone regarding affordable housing. If these people understand both the potential of the law and its technicalities, it is likely that in their town the comprehensive permit will not be a weapon wielded against them, but rather a tool they can use to shape creative housing development of the highest quality.